No. 13887

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JEWEL HAWKINS, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 57-71) below is reported at 110 F. Supp. 618; the Findings of Fact (R. 72-73) and Conclusions of Law (R. 74-78) are unreported.

JURISDICTION

This is an appeal by the United States from a judgment of the District Court in an action brought on February 27, 1950, by Jewel Hawkins against Lawrence Savage, doing business as Lee Savage Painting Company, as the holder of certain checks issued by Savage totaling $2,341.87 but dishonored by the drawee-bank for lack of sufficient funds. (R. 58.)

On April 19, 1950, Jewel Hawkins caused a writ of attachment to be served on J. B. Warrack Company, which acknowledged a debt of $2,341.87 to Lawrence Savage at that time. (R. 75.)

On September 21, 1950, the United States, having been granted leave to intervene, filed its petition of intervention seeking judgment against Lawrence Savage for unpaid taxes and asserting the priority of its tax lien over the attachment lien of Jewel Hawkins, with respect to the sum owing by J. B. Warrack Company to Lawrence Savage. (R. 33-37.)

On October 30, 1950, the court authorized service of summons upon Lawrence Savage by publication, upon a showing by Jewel Hawkins that Lawrence Savage could not be served with summons in the Territory of Alaska but did have personal property within the jurisdiction of the court. (R. 38-39.)

On June 6, 1952, upon motion of Jewel Hawkins, the court ordered default of Lawrence Savage for failure to answer the complaint. (R. 51.)

On September 17, 1952, the case was tried before the court without a jury and briefs were later filed. (R. 74.)

On March 9, 1953, the court filed a written opinion in favor of Jewel Hawkins and against the United States with respect to the issue of the priority of their respective liens as to the sum owed by J. B. Warrack Company to Lawrence Savage. (R. 70.)

On April 8, 1953, the court filed findings of fact and conclusions of law to the same effect as his opinion (R. 74-78) and rendered judgment awarding the $2,341.87 held by J. B. Warrack Company to Jewel Hawkins, discharging J. B. Warrack Company from all liability to Jewel Hawkins upon payment of that sum

to her or her attorney, and continuing the case as to the claims of the United States against Lawrence Savage. (R. 80-81.)

On April 14, 1953, the United States filed notice of appeal from the judgment of the District Court. (R. 81.)

On April 21, 1953, the court filed an order granting a stay of execution pending appeal and ordering J. B. Warrack Company to pay $3,284.86 into the registry of the court, since that amount represents the total debt to Lawrence Savage which J. B. Warrack Company acknowledged when served with a notice of tax levy on June 12, 1950. (R. 84.)

On May 18, 1953, the District Court extended the time for filing the record on appeal and for docketing the appeal to July 1, 1953 (R. 85) and on June 16, 1953, extended the time to July 12, 1953 (R. 104).

On June 16, 1953, the United States filed its designation of record on appeal. (R. 85-86.)

On July 1, 1953, the United States filed in this Court a statement of points upon which appellant intends to rely on appeal. (R. 107-108.)

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, c. 786, 31 Stat. 321, Section 4, as amended (48 U.S.C. 1946 ed., Sec. 931). This Court has jurisdiction to review a final decision of the District Court for the Territory of Alaska under the provisions of 28 U.S.C., Sections 1291 and 1294.

QUESTION PRESENTED

Did the District Court err in holding that Jewel Hawkins was a "purchaser" within the meaning of Section 3672 of the Internal Revenue Code, and was therefore entitled to priority over tax liens of the United States,

notices of which were filed subsequent to an attachment by Hawkins but prior to the date she secured judgment?

STATUTES INVOLVED

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1946 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASES, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by

the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3672.)

3 Alaska Compiled Laws Annotated (1949):

SEC. 55-6-67. *Plaintiff's rights against third persons: Liability of persons failing to transfer property to marshal.* From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property. Any person, association, or corporation mentioned in subdivision three of the section last preceding, from the service of a copy of the writ and notice as therein provided, shall, unless such property, or debts be delivered, transferred, or paid to the marshal, be liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied.

STATEMENT

The facts are not in dispute. The chronological sequence of events is as follows:

On December 27-28, 1949, the Collector of Internal Revenue received the Commissioner's assessment lists containing assessments of withholding and Federal Insurance Contributions Act taxes against Lawrence Savage for the taxable quarter ending September 30, 1949,

totaling $2,711.90, plus penalties and interest, and notified Savage of the assessments, and demanded payment. (R. 58.)

On February 27, 1950, Jewel Hawkins commenced an action against Lawrence Savage to recover $2,341.87 for which sum she had been held liable as indorser of certain checks drawn by Savage which had been dishonored by the bank for lack of sufficient funds, plus costs and attorneys' fees. (R. 58.)

On April 19, 1950, the writ of attachment was served on J. B. Warrack Company, which acknowledged that it owed Lawrence Savage $2,341.87 at that time. (R. 58.)

On June 12, 1950, the Collector of Internal Revenue served on J. B. Warrack Company a notice of levy for taxes in the principal sum of $2,969.05 (R. 58), at which time J. B. Warrack Company acknowledged that it owed Lawrence Savage a total of $3,284.86 (R. 84).

One June 13, 1950, a notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska. (R. 58.)

On June 22, 1950, the Collector of Internal Revenue received the second assessment list containing an assessment of withholding and Federal Insurance Contributions Act taxes against Lawrence Savage for the taxable period ending June 16, 1950, totaling $632.47, and notified Savage of the assessment, and demanded payment. (R. 58-59.)

On June 30, 1950, a second notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska, covering the second assessment. (R. 59.)

On June 6, 1952, Jewel Hawkins secured an order of default as to Lawrence Savage. (R. 51.)

The District Court held that Hawkins was obviously

not a mortgagee, pledgee or judgment creditor within the meaning of Section 3672 of the Internal Revenue Code, and therefore could not prevail unless she was a "purchaser" of the property before the Government's lien was filed for record on June 13, 1950. (R. 66.) It held, however, that under 3 Alaska Compiled Laws Annotated, Section 55-6-67, *supra,* a plaintiff who attached before judgment was given the status of a purchaser against third persons (R. 68-69); that "third persons" in the Alaskan statute includes the United States (R. 70); that Hawkins' attachment made her a purchaser within the meaning of Section 3672 of the Internal Revenue Code; and that as her attachment was secured prior to the time the Government's notices of liens were filed, she was entitled to priority.

STATEMENT OF POINTS TO BE URGED

A statement of points upon which the Government relies is set forth in the Record (pp. 107-108). It may be summarized as follows:

The court erred in concluding that Hawkins' attachment made her a purchaser within the meaning of Section 3672 of the Internal Revenue Code; and in concluding that she was entitled to priority over federal tax liens, notices of which were filed prior to judgment, though subsequent to Hawkins' attachment.

SUMMARY OF ARGUMENT

A federal tax lien attaches to all property or rights to property of the taxpayer upon the date the assessment list is received by the Collector. It is, though no notice thereof has been filed, valid against all persons other than those enumerated in Section 3672 of the Internal Revenue Code. Subsection (a) of that section is the

only portion thereof material to a decision of the instant case. It provides that a federal tax lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed in the manner therein prescribed. The purpose for which the section was enacted shows, and the decisions hold, that the terms "mortgagee", "pledgee", "purchaser", and "judgment creditor" are used in their conventional sense; and that one can not be brought within the terms of the statute merely because by legislative fiat or by local court decisions he is accorded the *status* of one of the excepted classes.

It is at least doubtful whether the Congress, which enacted both the Alaskan statute (in 1900) and Section 3672 (in 1913), had the power to accord special treatment to the claims of residents of Alaska by giving them priority where under the same circumstances claims of citizens residing elsewhere would be inferior to federal tax liens. But regardless of whether or not the Congress had such power, the purpose for which Section 3672 was enacted, disclosed by its history, clearly shows that the Congress did not intend that "purchaser" as used in the Alaskan statute be a "purchaser" within the meaning of Section 3672. On the contrary, the Congress intended that the latter section should be uniformly applied throughout the United States and its territories.

ARGUMENT

The Lien of the United States for Taxes Was Superior to Hawkins' Attachment Lien

The tax lien which arises in favor of the United States at the time the assessment list is received by the Collector covers all property or rights to property belonging to the delinquent taxpayer. Sections 3670 and 3671,

Internal Revenue Code, *supra; Glass City Bank* v. *United States,* 326 U.S. 265. In construing the predecessor of these sections the Supreme Court held that local recording statutes did not apply to federal tax liens; and that such a lien could be asserted even against a purchaser of the taxpayer's property, for value and without notice of the outstanding tax lien. *United States* v. *Snyder,* 149 U.S. 210.[1]

It was to correct this inequity that Congress in 1913 enacted the predecessor of Section 3672, Internal Revenue Code, *supra* (Revised Statutes, Section 3186, amended by the Act of March 4, 1913, c. 166, 37 Stat. 1016), which provided that a tax lien should not be valid as against mortgagees, purchasers or judgment creditors until filed for record in the manner prescribed. The provision was later amended (Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 401) to add pledgees to the protected classes (and in other respects immaterial here).

It is thus seen that prior to 1913 an unrecorded federal tax lien yielded priority to no one—not even to an innocent purchaser for value. See the decision of this Court in *MacKenzie* v. *United States,* 109 F. 2d 540. The doctrine of relation back—which by process of judicial reasoning merges the attachment lien into the judgment and relates the judgment lien back to the date of attachment—does not operate to destroy the realities of the situation. When the tax liens of the United States were recorded Hawkins did not have a judgment lien. She had a mere caveat of a more perfect lien to come. The doctrine of relation back does not apply

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[1] The same was true of the estate tax lien (*Detroit Bank* v. *United States,* 317 U.S. 329) until after the amendment found in Section 827, Internal Revenue Code.

against the United States. See *United States* v. *Security Tr. & Sav. Bk.,* 340 U.S. 47;[2] *New York* v. *Maclay,* 288 U.S. 290.

The District Court in this case recognized the above when it held (R. 66) that, to prevail over the United States, Hawkins must fall within one of the four protected classes. The court further held that she was obviously not a mortgagee, pledgee, or judgment creditor, and, therefore, could prevail only if she was a "purchaser" of the property before the Government's lien was filed for record. (R. 66.)

The real basis for the District Court's decision that Hawkins was a "purchaser" is that the Alaskan statute was enacted by the Federal Congress. We submit that the question is whether the Congress, in enacting Section 3672, intended that the term "purchaser" should include residents of the Territory of Alaska, while admittedly it did not intend to include persons given that status under local laws enacted by the states. It must not be forgotten that in legislating for the territories the Congress exercises the combined powers of the general, and of a state government. *American Insurance Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 545; *Benner* v. *Porter,* 9 How. 235, 242; *National Bank* v. *County of Yankton,* 101 U.S. 129. In *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, the Court said (p. 317):

> The national government may do for one of its dependencies whatever a state might do for itself

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[2] The fact that here the second assessment list was received by the Collector subsequent to the date Hawkins' attachment issued is immaterial. The same was true in *United States* v. *Security Tr. & Sav. Bk.* See the case below, *sub nom. Winther* v. *Morrison,* 93 Cal. App. 2d 608, 209 P. 2d 657. The material fact is that notice thereof was filed prior to the date judgment was secured.

> or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible. * * *

Clearly the attachment statute which the Congress enacted for Alaska falls within the scope of state legislation. As the District Court points out (R. 69), the Alaskan statute was adopted *verbatim* from the laws of Oregon, "the wording of which is identical with that of our statute." In *Allen* v. *Myers,* 1 Alaska Rep. 114, the court said (p. 118):

> In passing the Act of June 6, 1900 (31 Stat. 321, c. 786), commonly called the "Alaska Code", Congress exercised its power as a state government, and that Code, which is practically identical with that in Oregon and other code states, is to be considered and construed as if enacted by the Legislature of a State.

In such circumstances, it would take clear and compelling language to impute to Congress the intention when in 1913 it enacted Section 3672 to give a preferential status to residents of Alaska over residents of continental United States and its other territories. We submit that to so hold would be contrary to the import of the decisions of the Supreme Court. Cf. *Burnet* v. *Harmel,* 287 U.S. 103, wherein it was held that in applying a federal taxing statute, the purpose of Congress controls, and that in the absence of language evidencing a different purpose the statute is to be given a uniform application to a nationwide scheme of taxation; that state law may control only when the operation of the federal

taxing act by express language or by necessary implication makes its own application dependent upon state law.

In *United States* v. *Gilbert Associates,* 345 U.S. 361, involving the meaning of the term "judgment creditor" as used in Section 3672, the Court said (p. 364):

> A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a "judgment creditor" should have the same application in all the states.

And further, following the logic of Justice Jackson's concurring opinion in the *Security Tr. & Sav. Bk.* case, the Court said (p. 364):

> In this instance, we think Congress used the words "judgment creditor" in Section 3672 in the usual conventional sense of a judgment of a court of record, since all states have such courts. * * *

And cf. *United States* v. *Eisinger Mill & Lumber Co.,* decided by the Court of Appeals of Maryland July 2, 1953 (1953 C.C.H., par. 9504), holding that a mechanic lienor is not a "pledgee" within the meaning of Section 3672.

We submit, and no reason has been suggested to the contrary, that the term "purchaser" as used in Section 3672 is used in its conventional sense.[3] There have been but few decisions construing the term "purchaser" as therein used. In *National Refining Co.* v. *United States,* 160 F. 2d 951 (C.A. 8th), the court said (p. 955):

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[3] Cf. *Grossman* v. *City of New York,* 188 Misc. 256, 66 N.Y.S. 2d 363, holding that a mechanic lienor was a "purchaser" under the statute, and *Cranford Co.* v. *Leopold & Co.,* 272 App. Div. 831, 70 N.Y.S. 2d 183, which followed the *Grossman* case. These cases are contrary to the *Security Tr. & Sav. Bk.* case and the *Gilbert Associates* case. See *United States* v. *Eisinger Mill & Lumber Co., supra.*

> * * * one who, for a valuable present consideration, acquires property or an interest in property is a "purchaser" within the meaning of 26 U.S.C.A., Int. Rev. Code, Section 3672. * * *

The undisputed facts here show that Hawkins was not a "purchaser" in the conventional use of that term. A purchaser acquires title to the property purchased. Here, Hawkins had because of the attachment a mere inchoate lien, and any acquisition of title was contingent upon a future judgment. See *MacKenzie* v. *United States, supra; United States* v. *Security Tr. & Sav. Bk., supra;* and *United States* v. *Gilbert Associates, supra.* Her lien gave her no right to the property before it had been perfected. Until that time she had merely a power over the property "and not an actual interest in it." See *Conrad* v. *Atlantic Insurance Co.,* 1 Pet. 386, 444.

CONCLUSION

The decision of the District Court is erroneous and should be reversed.

Respectfully submitted,

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